2006

A-1 Disposal v. Mel Ingersoll : Reply Brief

Utah Court of Appeals

Carl E. Kingston; Attorney for Appellee.
Blake S. Atkin; William O. Kimball; Brennan H. Moss; Attorneys for Appellant.

ORIGINAL

Blake S. Atkin #4466
William O. Kimball #9460
Brennan H. Moss #10267
ATKIN LAW OFFICES, P.C.
136 South Main, Suite A401
Salt Lake City, Utah 84101
Telephone (801) 533-0300

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

A-1 DISPOSAL Plaintiff and Appellee, vs. MEL INGERSOLL, Defendant and Appellant.	App. No. 20060261 Civil No. 030904374

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, JUDGE COLLECTION

Carl E. Kingston
3212 South State Street
Salt Lake City, Utah 84115
Attorney for Plaintiff and Appellee

Blake S. Atkin
William O. Kimball
Brennan H. Moss
ATKIN LAW OFFICES
136 Main Street, Suite A401
Salt Lake City, Utah 84109
Attorneys for Defendant and Appellant

Date 10/2/06 UTAH SUPREME COURT/UTAH COURT OF APPEALS Case No. 20060261

CHECKLIST FOR APPELLANT'S REPLY BRIEFS

✓ CHECK TO SEE THAT THE RECORD HAS BEEN RETURNED.

✓ TIMELY FILING OF BRIEFS

An untimely brief may be rejected under **Rule 27(e)**. If a brief is untimely, a motion under **Rule 26** will be mandatory for permission to file a late brief.

✓ CORRECT NUMBER OF COPIES

1. Supreme Court: 10 copies, one containing original signature
2. Court of Appeals: 8 copies, one containing original signature

✓ LENGTH 25 pages

✓ SIZE AND BINDING

✓ PRINTING REQUIREMENTS

1. Proportionally spaced typeface must be 13-point or larger for both text and footnotes: mono-spaced typeface may not contain more than 10 characters per inch.
2. Print on both sides of the page.
3. Double-spaced: 1½ spacing is unacceptable.
4. 1" margin on all sides

✓ COVER REQUIREMENTS

1. Color: **Gray**
2. Name of counsel and parties represented
   - A. Counsel filing brief on **lower right**
   - B. Opposing counsel on lower left

CONTENT REQUIREMENTS - IN ORDER STATED

✓ List of all parties

✓ Table of Contents with page references

✓ Table of Authorities

✓ Argument

✓ Conclusion

✓ Signature of counsel of record or party if pro se

✓ Proof of Service

Blake S. Atkin #4466
William O. Kimball #9460
Brennan H. Moss #10267
ATKIN LAW OFFICES, P.C.
136 South Main, Suite A401
Salt Lake City, Utah 84101
Telephone (801) 533-0300

IN THE UTAH COURT OF APPEALS, STATE OF UTAH

A-1 DISPOSAL Plaintiff and Appellee, vs. MEL INGERSOLL, Defendant and Appellant.	App. No. 20060261 Civil No. 030904374

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, JUDGE COLLECTION

Carl E. Kingston
3212 South State Street
Salt Lake City, Utah 84115
Attorney for Plaintiff and Appellee

Blake S. Atkin
William O. Kimball
Brennan H. Moss
ATKIN LAW OFFICES
136 Main Street, Suite A401
Salt Lake City, Utah 84109
Attorneys for Defendant and Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. SUMMARY OF ARGUMENTS 1

II. ARGUMENT 1

a. Correct Standard of Review: Correction of Error 1

b. Conduct of the Parties Shows the Existence of a Contract 3

c. Mr. Ingersoll's Case was not Dependent upon Proving the Existence of a Contract 4

d. Rule 54, Utah Rules of Civil Procedure, does not Allow a Court to Make a Finding on a Question of Law that has not been Tired 6

III. CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Bailey v. Call, 767 P.2d 138, 139 (Utah Ct. App. 1989) 2
Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733, 735 (Utah 1984) 6
Cowley v. Porter, 127 P.3d 1224, 1230 (Utah Ct. App. 2005) 2
D'Aston v. Aston, 844 P.2d 345, 350 (Utah Ct. App. 1992) 7
Farr v. Brinkerhoff, 829 P.2d 117, 120 (Utah Ct. App. 1992) 6
Herm Hughes & Sons, Inc. v. Quintex, 834 P.2d 582, 583 (Utah Ct. App. 1992) 2
Osguthorpe v. Anschutz Land & Livestock Co., 456 F.2d 996, 1000 (10th Cir. 1972) 3,4
State v. Pearson, 985 P.2d 919, 921 (Utah Ct. App. 1999) 3,4

STATUTES

Utah Code Ann. § 70A-2-204 3,4

RULES

Rule 54, Utah Rules of Civil Procedure 6,7

I. SUMMARY OF ARGUMENTS

The Appellee raises several new issues in its brief filed with this Court on August 28, 2006. The Appellee contends that (1) Mr. Ingersoll had a duty to marshal the facts in its opening brief, and failed to do so; and (2) contends that Mr. Ingersoll's due process rights were not violated because his entire case was centered upon proving the existence of a contract. (Aplee Br. at 6, 11). The Appellee is incorrect in both of its assertions. Mr. Ingersol was not required to marshal the evidence with respect to the finding that a contract did not exist; since a conclusion as to whether a contract exists is a question of law, not fact. Moreover, it is absurd to speak of marshaling the evidence regarding what was not an issue at trial. Were Mr. Ingersol given proper notice that the existence of the contract was in issue, he would have presented his case differently and more evidence of the existence of a contract would have been available to marshal. Mr. Ingersol's case was not centered upon proving the existence of a contract. The parties agreed that a contract existed; that issue was never presented to the Court. The dispute presented to the trial court was whether there had been a breach of the contract. Mr. Ingersol was not given notice that "whether a contract existed was an issue."

II. ARGUMENT

a. Correct Standard of Review: Correction of Error

Mr. Ingersoll contends that the trial court erred when it concluded that a contract did not exist between the parties. Mr. Ingersoll presented two issues for review by this

Court. (1) Did the trial court err when it concluded that there was no contract between the Appellant and the Appellee when both parties testified that there had been a contract? (2) Did the trial court err in finding that there was no contract when that issue was not in contention and was not disputed by the parties? Mr. Ingersoll stated that this Court should review the issues under the clearly erroneous standard; however, that was an incorrect standard. On further analysis in response to appellees assertions, Mr. Ingersol corrects his earlier contention about the standard of review.

The first issue surrounds the trial court's conclusion that a contract did not exist. The trial court's conclusion that a contract did not exist is a conclusion of law which should be reviewed under the correction of error standard. In Herm Hughes & Sons, Inc. v. Quintex, where the sole issue on appeal was whether the trial court erred in ruling that no contract existed between the parties, this Court stated: "Whether a contract exists between parties is a question of law; therefore, we review the trial court's conclusion of law under a correction of error standard." Id., 834 P.2d 582, 583 (Utah Ct. App. 1992); citing, Bailey v. Call, 767 P.2d 138, 139 (Utah Ct. App. 1989). Therefore, the Court should review the trial court's conclusion that a contract did not exist between the parties under a correction of error standard, giving no deference to the trial court.

The second issue centers on the trial court's finding of a question of law that was not raised in the pleadings. A finding made by the trial court on an issue that is not in the pleadings is a conclusion of law which should be reviewed for correctness, giving no

deference to the trial court's ruling. This Court stated in Cowley v. Porter, that a "claim that the trial court erred in entering judgment . . . on a theory not raised by the pleadings involves a conclusion of law that we review under a correction-of-error standard." Id., 127 P.3d 1224, 1230 (Utah Ct. App. 2005). Therefore, this Court should review the trial courts ruling on an issue not tried before the court under the correction of error standard, giving no deference to the trial court's ruling.

b. Conduct of the Parties Shows the Existence of a Contract

Mr. Ingersoll argued in his brief that a contract between the parties is evidenced from the testimony and conduct of the parties. To support his contention that a contract can be formed by the conduct of the parties, Mr. Ingersoll cited to Utah Code Ann. Section 70A-2-204, which states that "a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Mr. Ingersoll also pointed this Court to Osguthorpe v. Anschutz Land & Livestock Co., which stands for the proposition that a contract can be formed as a result of either a writing, words, or conduct. Id., 456 F.2d 996, 1000 (10th Cir. 1972). The Appellee argues that Mr. Ingersoll's reliance upon this case is misplaced because Osguthorpe was a jury trial which was reviewed by the Tenth Circuit to determine whether the instructions given to the jury was correct. (Aplee. Br. at 10). Such a case is ideal when determining a question of law since jury instructions are reviewed under a standard of correctness. State v. Pearson, 985 P.2d 919, 921 (Utah Ct. App.

1999). The Tenth Circuit's declaration of the legal doctrine regarding the formation of a contract is extremely helpful. Further, the case is significant because it interprets Utah Code Ann. Section 70A-2-204 to mean that contracting parties may enter into a contract orally or by their conduct. Osguthorpe at 1000. The conduct of the parties in the case before this court shows that it was the intent of the parties to be bound by the agreement reached on May 15, 2002. (App. Br. at 8,9).

c. Mr. Ingersoll's Case was not Dependent upon Proving the Existence of a Contract

The Appellee argues that Mr. Ingersoll's due process of law was not violated by the trial courts conclusion because his case was dependant upon proving the existence of a contract. The Appellee is wrong. On March 26, 2003, Mr. Ingersoll answered the complaint filed by Appellee and brought a counterclaim for breach of contract. Mr. Ingersoll's breach of contract claim was not dependent upon proving the existence of a contract because the parties both agreed that a contract existed. Rather, Mr. Ingersoll's case was dependant upon showing that the Appellee had received proper consideration for the contract and the Appellee had breached its obligations under the contract.

The Appellee attempts to support its contention that the issue of the existence of a contract was always at issue by claiming that in answering Mr. Ingersoll's complaint, it denied the existence of a contract. (Aplee. Br. at 12). Even if such a statement is true, Appellee's denial was made at the beginning of the case. As the case progressed, the Appellee changed its tune. As manifested in its Proposed Findings of Fact and

Conclusions of Law, the basis for its claim that it was owed $9,006.25 by Appellant was that it had entered into a contract for goods and services. (A-1's Proposed Findings of Fact and Conclusions of Law ¶5). It further proposed that an agreement had been reached between the parties which was:

> That part of the agreement was that Defendant would provide a certain motor vehicle valued at $14,500.00 to one Mark Powell, Mark Powell would deliver motor vehicle and three roll-off containers valued at $14,500.00 to Plaintiff and Defendant would be entitled to credit for the value of the vehicle he provided to Powell in the amount of $14,500, from Plaintiff. The agreement also provided that Defendant would pay Plaintiff 25% of the value of services rendered to Defendant, in cash, ten days following the end of the month in which the services were rendered and the remaining 75% of the value of the services would be applied towards the $14,500.00 credit.

(A-1 Proposed Findings of Fact and Conclusions of Law ¶6). It is evident from Appellee's Proposed Findings of Fact and Conclusions of Law, submitted before trial, that it believed that a contract existed between the parties.

In fact, the Appellee has never argued that a contract did not exist between the parties. The basis of Appellee's defense was that Mr. Ingersoll breached the contract and therefore it was void. The Appellee makes this clear in its brief to this Court when it quotes its counsel in his opening statement saying "So that agreement, at least in the eyes of the plaintiff, was void. It wasn't followed through; it was breached." (R. at 88). By the Appellee's own admission in its brief, a contract existed between the parties, and the question it presented to the trial court was whether that contract was breached or voided.

Contrary to Appellee's contention, the trial court did not answer the question of

law presented by the Appellee; rather than finding that the contract had been breached or voided, it found that a contract did not exist between the parties. Mr. Ingersoll's right to due process of law was violated because the trial court made a finding on a question of law which was not in contention between the parties. Had notice been given to Mr. Ingersoll, he would have had the opportunity to present evidence to prove the existence of a contract between the parties.

d. Rule 54, Utah Rules of Civil Procedure, does not Allow a Court to Make a Finding on a Question of Law that has not been Tried

The Appellee argues that even if it had not presented the question of the existence of a contract, the relief granted by the trial court was proper under Rule 54, Utah Rules of Civil Procedure. (Aplee. Br. at 12,13). Rule 54 provides that "every final judgment shall grant the relief to which the part in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." The Appellee is incorrect in its assertion, Rule 54 is limited in scope to those issues which are presented to the court, and supported by evidence. The Utah Supreme Court has stated "although Rule 54(c)(1) permits relief on grounds not pleaded, that rule does not go so far as to authorize the granting of relief on issues neither raised nor tried." Farr v. Brinkerhoff, 829 P.2d 117, 120 (Utah Ct. App. 1992); quoting, Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733, 735 (Utah 1984). The question regarding the existence of a contract was never tried.

As is apparent in the Appellee's brief, the issue of whether or not a contract existed was never raised nor tried before the trial court. An issue is tried when a party has

had a fair opportunity to present and have determined an issue of law or fact. Cf., D'Aston v. Aston, 844 P.2d 345, 350 (Utah Ct. App. 1992). The question of law before the trial court was whether the parties breached the terms of the agreement entered into. Only evidence surrounding the obligations and performances of the parties was presented to the trial court to show either that the contract had been breached. Evidence surrounding the question of law of whether a contract existed was not presented to the court, and therefore the issue was not tried. Mr. Ingersoll was never given the opportunity to present a case on the question of law of whether a contract existed. Since Mr. Ingersoll was never given that opportunity, the question of whether a contract existed between the parties has not been tried, and a finding on that question of law is error on the part of the trial court.

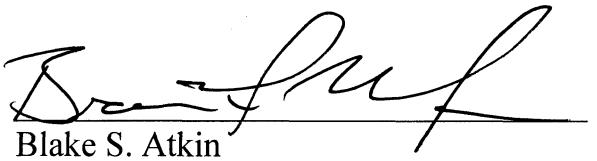
III. CONCLUSION

The issues raised before this Court by Mr. Ingersoll are questions of law and therefore should be reviewed under the correction of error standard. Upon review of the record before the trial court, it is evident that the parties agreed that they had entered into a contract. It is error for the trial court to make a conclusion of law on an issue which was agreed to by the parties. Further, the question of law asking whether a contract existed was not in dispute by the parties and therefore never presented for determination by the trial court. Therefore, since the question was never tried before the trial court, Mr. Ingersoll's due process of law was violated when the trial court made a determination on

the issue. For the foregoing reasons, Mr. Ingersoll requests that the trial court's determination that a contract did not exist between the parties be reversed to find in favor of Mr. Ingersoll in the amount of the unused credit of $6,193.00.

DATED this 2 of October, 2006.

ATKIN LAW OFFICE, P.C.

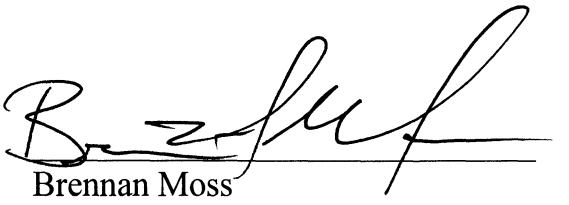


Blake S. Atkin
William O. Kimball
Brennan H. Moss
Attorneys for Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the **APPELLANT'S REPLY BRIEF** was mailed first class, postage prepaid this 2 day of October, 2006 to the following:

Carl E. Kingston
3212 South State Street
Salt Lake City, UT 84115



Brennan Moss